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No. 04-60

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARTINGALE, LLC,

Petitioner,

v.

THE CITY OF LOUISVILLE; WATERFRONT DEVELOPMENT CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When a District Court grants summary judgment dismissing on the merits an action for declaratory judgment and injunctive relief seeking to bar a state court condemnation proceeding, and does so without addressing application of the Anti-Injunction Act, 28 U.S.C. § 2283, and the Circuit Court of Appeals affirms the summary judgment on the Anti-Injunction Act alone, is the case appropriate for Supreme Court review of nominal but irrelevant differences in the Circuits' application of the Anti-Injunction Act?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The respondents have no parent companies and no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

I. Procedural History of the Case

Bridge the Gap and Martingale filed the underlying complaint and amended complaint seeking a declaration of rights and injunctive relief. They sought a declaration from the trial court that the City of Louisville (the "City") and the Waterfront Development Corporation ("WDC") do not have legal authority to condemn the structure and piers of the Big Four Bridge (the "Bridge"), a former railroad bridge spanning the Ohio River between Louisville, Kentucky, and Jeffersonville, Indiana, the approaches to which were razed thirty years ago. Bridge the Gap and Martingale also sought an order from the trial court enjoining the City and WDC from proceeding with a state condemnation action against the Bridge.[1] At no time did the Petitioners below request or obtain an injunction hearing in the trial court pursuant to Fed. R. Civ. Pro. 65.

Bridge the Gap and Martingale asserted that the City is prohibited from condemning the Bridge because: (1) the Bridge is part of interstate commerce; (2) federal law regulates bridges over navigable waters; (3) the Bridge is a postal route and condemnation of the Bridge will interfere with the delivery of mail; (4) the City cannot condemn the Bridge as personal property; and (5) Bridge the Gap and Martingale have a franchise and the City cannot condemn a franchise.

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[1] Martingale's petition for a writ of certiorari is mistaken in stating that "Martingale had sought only a declaratory judgment." Petition at 4. Both paragraph 22 of the Amended Complaint and paragraph 2 of the *ad damnun* request. "An injunction restraining and enjoining Defendants, City of Louisville and Waterfront Development Corporation[,] from condemning the Big Four Bridge."

The City and WDC filed a motion for summary judgment on each and every substantive claim, adding for good measure an argument that plaintiffs' prayer for injunctive relief violated the Anti-Injunction Act, 28 U.S.C. § 2283. The trial court granted the motion for summary judgment on all of Martingale's and Bridge the Gap's claims. Appendix to Martingale's Petition for Writ of Certiorari ("App.") at 14-24. The trial court ruled that "the contention that the Bridge is in interstate commerce is ludicrous." App. at 19. The trial court held that the Rivers and Harbors Act does not prohibit condemnation of the Bridge, and the designation of the Bridge as a post route in the 1800s does not preclude the City from condemning the Bridge after more than thirty years of nonuse. App. at 20-21. The court also rejected the claim that Bridge the Gap owned franchise rights related to the Bridge. App. at 21-24. Having thus disposed of all the substantive claims, the trial court was not moved to consider the import of plaintiffs' request for injunctive relief.

Bridge the Gap and Martingale appealed the trial court's summary judgment order. The U. S. Court of Appeals for the Sixth Circuit affirmed, choosing to uphold summary judgment on the sole ground that the Anti-Injunction Act prohibited the trial court from enjoining the state court condemnation proceeding. App. at 1-13. It found "clever but unpersuasive" Petitioner's argument that, although the Anti-Injunction Act "may bar their request for an injunction," it did not bar a claim for declaratory judgment, since the ultimate goal with either was to halt the condemnation proceeding. App. at 10. Because the Sixth Circuit found the Anti-Injunction Act dispositive, the court concluded there was no need to address the merits of Petitioner's claims.

Although both Bridge the Gap and Martingale pursued this action at the trial court level and before the Sixth Circuit, only Martingale petitioned for writ of certiorari to this Court.

II. Factual Background

A. History of the Big Four Bridge

In 1888, the Kentucky General Assembly chartered the Louisville and Jeffersonville Bridge Company. *See* 1888 Ky. Acts, ch. 212. The General Assembly granted the Louisville and Jeffersonville Bridge Company the "right and power to construct, maintain and operate a bridge . . . and to charge, demand and receive tolls for the use thereof." *Id.* at § 2. The General Assembly also granted the Louisville and Jeffersonville Bridge Company the authority to "enjoy all corporate powers, privileges and franchises necessary or proper to enable [it] to carry out and execute the purposes hereinafter designated." *Id.* at § 1.

The United States Secretary of War permitted bridges to be erected across the Ohio River for railroad and other uses, including use as a post route. Act of December 17, 1872, Ch. IV, 17 Stat. 398. The 1872 Act provides that "any persons or corporations, having lawful authority therefor, may hereafter erect bridges across the Ohio River, for railroad or other uses. . . ." The Act, however, does not grant a franchise in connection with the construction of bridges.

The Louisville and Jeffersonville Bridge Company constructed the Bridge in question between 1888 and 1895. In 1927, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company ("the Big Four") purchased the Bridge.

In 1968, after over 70 years of operation, the Big Four filed an application with the United States Interstate Commerce Commission to abandon the Bridge. The Big Four represented to the ICC that, since a new replacement bridge was in service just west of the Bridge, the continued operation of the Bridge "would constitute a financial burden . . . and an undue burden on interstate commerce." On May 1, 1969, the Interstate Commerce Commission approved the application to abandon the Bridge, concluding that "the continued maintenance and operation of the [Bridge] would impose an undue and unnecessary burden on applicant and upon interstate commerce."

In 1974, the approaches to the Bridge were razed, leaving only the piers and superstructure of the Bridge without provision for any access from either the Kentucky or Indiana shore. As the trial court recognized, the Bridge today is "inaccessible to humans, except those with extremely long ladders." App. at 19.

On October 16, 1987, Bridge the Gap, Inc., purchased the Kentucky portion of the Bridge superstructure for $10,300 at a Jefferson County, Kentucky, sheriff's sale. Bridge the Gap's purchase of the Bridge soon became the subject of a lawsuit in the Jefferson Circuit Court. The Jefferson Circuit Court eventually concluded that Bridge the Gap owned the Bridge superstructure only, that the Bridge had been severed from the abutting real property, and that the Bridge superstructure was personal property.

On December 7, 2000, Bridge the Gap entered into an agreement to sell the Bridge to Martingale for $400,000. The contract of sale entered into by Bridge the Gap and Martingale makes no reference to a franchise.

The WDC owns the real property under the portion of the Bridge located in Kentucky, and the City of Jeffersonville, Indiana, owns the real property under the portion of the Bridge located in Indiana. Neither Bridge the Gap nor Martingale possesses any easement, right, or license, either recorded or unrecorded, permitting them to maintain the Bridge on WDC's property or to have any right or privilege of ingress or egress across the WDC's property to obtain access to the Bridge.

B. Development of Waterfront Park

In the 1990's, WDC began development of Waterfront Park in the City of Louisville. Part of the initial plans for Waterfront Park included the conversion of the Big Four Bridge into a pedestrian walkway across the Ohio River. The City began negotiating with Bridge the Gap and Martingale to acquire their interests in the Bridge. The WDC was unable to obtain these interests by voluntary agreement. Bridge the Gap publicly stated that the only way the City could acquire the Bridge was through a condemnation action. In the interval since the District Court's summary judgment, Bridge the Gap withdrew its opposition to condemnation of the Bridge. Thus, only Martingale filed the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. The Issue of Whether the Anti-Injunction Act Bars Martingale's Federal Action Is Entirely Collateral and Not Dispositive.

This case involves a unique set of facts that make it ill-suited for U. S. Supreme Court review and the wrong

case to serve as a pretext for assessing nominal differences in the U. S. Circuit Courts' application of the Anti-Injunction Act.

Here, the central issue raised in the District Court is whether the City has the authority to condemn the Bridge. Condemnation is a matter uniquely in the purview of the state court, and Kentucky statute requires a condemnation action to be filed in state court. *See* KRS § 416.570 (2004). The District Court action was merely an attempt by the Petitioner to avoid state court jurisdiction over the City's obvious authority to condemn the Bridge. The U. S. District Court thoroughly examined the "merits" of the Petitioner's claims and decided they were no bar to the City's authority to condemn.

Moreover, unlike other cases involving the timing of the state and federal actions in the context of applying the Anti-Injunction Act, this is not a case in which the City raced to the courthouse to file a state court action to gain a more favorable venue. The City had no choice but to file its condemnation action in state court, since Kentucky requires such an action to be filed there. KRS § 416.570 (2004). Likewise, neither did the City rush to file its action to avoid a pending ruling by the federal court. No ruling was pending. Indeed, neither the City's motion for summary judgment nor any motion by the Petitioner was ripe for decision when the state court condemnation action was filed.

Ultimately, this case does not merit attention by the U. S. Supreme Court because, even if the Court issues a writ, determines that the Anti-Injunction Act does not bar Martingale's action, and remands the case to the Sixth Circuit, the outcome is not likely to change. As fully set

forth in Section IV, the City obtained summary judgment on the merits of the claims at issue, and it is highly unlikely that the Sixth Circuit would find grounds for overturning the U. S. District Court's summary judgment should it be required to examine that judgment on remand.

II. Petitioner's Cases Applying the Anti-Injunction Act Are Readily Distinguishable.

The Petitioner makes much ado about the split among the circuits concerning application of the Anti-Injunction Act. The split among the circuits has no impact here, however, because the cases cited by the Petitioner are distinguishable on the unique set of facts before the Court. Even under the cited cases, the Anti-Injunction Act still prevents the trial court from enjoining the state court action in this instance.

A. Seventh Circuit – *Barancik*

The Petitioner relies most heavily on the Seventh Circuit's decision in *Barancik v. Investors Funding Corporation of New York*, 489 F.2d 933 (7th Cir. 1973) – purportedly the "clearest conflict" with the Sixth Circuit due to the Seventh Circuit's allegedly "ironclad" first-to-file rule. Petition at 7, 11. Due, however, to the unique facts in both *Barancik* and this case, this matter would not be decided differently in the Seventh Circuit than in the Sixth.

In *Barancik*, the plaintiffs owned certain real estate that they sold to the defendants in a sale-leaseback transaction. After a dispute arose relating to payments under the transaction, the plaintiffs filed suit in federal court, alleging several claims, including claims under the Securities

Exchange Act of 1934. *Id.* at 934. After the defendants served a formal notice of default, the plaintiffs moved for an injunction to prohibit the defendants from pursuing the defaults in state court. *Id.* at 934. Over the next five months, the parties filed various papers relating to pending motions. *Id.* On January 5, 1973, the federal court judge ordered the parties to make a report on January 16, 1973, on the status of the questions raised by the plaintiff's motion. *Id.*

On January 11, 1973, approximately eight months after the federal court action was initially filed and after months of briefing the issues, the defendants filed a forcible entry and detainer action in Illinois state court. Trial of that action was set for January 25, 1973. *Id.* The parties appeared in the federal court action on January 16, 1973, and informed the court of the development. *Id.* On January 25, 1973, the day before the state court trial was to commence, the U. S. District Court enjoined the defendants from proceeding with the state court action. *Id.*

The Seventh Circuit held the Anti-Injunction Act did not bar the federal court from hearing the injunction motion because the federal court action was filed before the state court action. That decision was based in part on the reasoning: "if a defendant has endeavored to delay proceedings or to forestall decision on issues pending in the federal court," the filing of a subsequent state action "may represent an attempt to obtain a more favorable forum. It may tend to fragment litigation which is best decided as a single matter; it may even evidence disrespect for the federal tribunal." *Id.* at 936.

Further, the court held the plaintiff's motion was "ripe for decision by the federal court when the defendant

invoked the jurisdiction" of the state court. *Id.* "During its process of deliberation, the court, not the defendant, should have the ultimate power to determine the scope of its authority." *Id.* at 937. In summary, the court ruled, "the commencement of the state action after the filing of the status quo motion, at a time when it was apparent to all concerned that the motion was about to be decided, was merely one factor for the court to consider in exercising its discretion." *Id.* at 938.

The unique circumstances of *Barancik* are entirely distinguishable from those in this case. Here, the City filed the state court action only three months after federal court action was filed and before any briefing or other activity had taken place in the federal court action. Unlike *Barancik*, the injunction was not ripe for deliberation when the City filed its condemnation action in state court. There was no motion pending on which the trial court could have ruled. Moreover, the City did not file its condemnation action in federal court merely to seek a better venue for the issues to be determined by the federal court. The City had no choice but to file its condemnation action in state court due to the unique nature of a condemnation proceeding. Only a state court can hear a condemnation action. *See* KRS § 416.570 (2004). The City was not, therefore, opting for a more favorable forum in the state court. The reasoning of *Barancik* simply does not support the outcome the Petitioner seeks.

Moreover, *Barancik* was decided thirty-one years ago, and since that time the Seventh Circuit has had only one occasion to cite it, in a dissenting opinion by Judge Cudahy in *Palmer v. Chicago*, 755 F.2d 560 (7th Cir. 1985), for the general proposition that a federal court should enjoin a state action that threatened to disburse funds

while federal proceedings were ongoing. *Id.* at 579, n. 2. The Seventh Circuit has not addressed the issue of the applicability of the Anti-Injunction Act in a first-filed federal case since *Barancik* was decided more than thirty years ago. A more recent decision by the Seventh Circuit suggests recognition that the Anti-Injunction Act is to be applied broadly to bar federal injunctions of state proceedings. *Blunt, Ellis & Loewi, Inc. v. Hlavinka*, 896 F.2d 240, 241 (7th Cir. 1990), *cert. denied*, 498 U.S. 813 (1990) (citing *Chick Kam Choo v. Exxon*, 486 U.S. 140, 147 (1988) ("The Supreme Court has recognized that the exceptions to the Anti-Injunction Act are narrow and not to be enlarged by loose statutory construction")).

The Seventh Circuit has, accordingly, permitted an injunction against a state court action only when a party's motives in pursuing the state court action, rather than waiting for a decision on an already-briefed federal court action, are questionable. That is not the situation here, and there is no reason to believe the Seventh Circuit would have permitted or condoned an injunction against a state court condemnation proceeding under the present circumstances. The nominal differences between the Sixth and Seventh Circuits would not affect the outcome here, and this case is not an appropriate vehicle to reach those differences.

B. First Circuit – *Hyde Park Partners*

The case of *Hyde Park Partners, LP v. Connolly*, 839 F.2d 839 (1st Cir. 1988), from the circuit the Petitioner identifies as applying the "pure First-to-File" rule, Petition at 9, is also distinguishable from this case on its facts. There, the plaintiff attempted to take over the defendant

company in a manner which violated the Massachusetts takeover statute. *Id.* at 840. On December 21, 1987, at 11:05 a.m., the purchaser sought an injunction in federal district court to enjoin the Commonwealth of Massachusetts and the takeover target from enforcing the statute, and the court set a hearing for 11:00 a.m. the following day. *Id.* At approximately 4:45 p.m. on the 21st, the target filed a complaint in state court seeking to enjoin the purchaser from purchasing the shares to effectuate the target. *Id.*

After the state court declined to grant the target's request for a temporary restraining order the afternoon of the 21st, due to insufficient facts in the complaint, the target filed an amended complaint the following morning, two hours before the federal court hearing was to begin. *Id.* at 841. Within minutes, the purchaser filed removal papers to remove the state court action to federal court. *Id.* Despite the removal petition, the state court granted the target's motion for a temporary restraining order and scheduled a hearing on a preliminary injunction for December 29, 1987. *Id.* The same day, the federal court denied the target's motion for remand of the state court case and granted the purchaser's preliminary injunction in the federal case, which was the subject of the appeal. *Id.*

The First Circuit determined that "the proper balance between federal and state courts . . . all but evaporate under inspection of the peculiar removal procedures that transpired in this chaotic flurry of litigation." *Id.* The court found that the removal of the state court proceeding was effectuated as soon as the removal papers were filed, and at that point the jurisdiction of the state court ceased. "The subsequent hearing and temporary restraining order

by the Superior Court were void *ab initio*." *Id.* at 842. Therefore, the First Circuit found the federal court injunction did not deprive the target of the earlier restraining order because the latter "'was a nullity anyway.'" *Id.* (citing *Polyplastics, Inc. v. Transconex, Inc.*, 713 F.2d 875, 880 (1st Cir. 1983)).

Further, the First Circuit held removal "was proper even if it was done in order to escape the strictures of the Anti-Injunction Act." *Id.* (citing *Bondurant v. Watson*, 103 U.S. (13 Otto) 281, 287-288 (1880)). To that, the court added a footnote, stating:

> The Anti-Injunction Act, 28 U.S.C. § 2283, does not, in any event, bar injunctive relief that would run against a state court – as, in effect, would the relief ordered here [citation omitted] when the federal court's injunctive power is *invoked* (i.e., requested) by the plaintiff before the state court action is commenced. *See Barancik v. Investors Funding Corporation of New York*, 489 F.2d 933 (7th Cir. 1973); *Nat'l City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982). *But see Roth v. Bank of the Commonwealth*, 583 F.2d 527 (1978).

Id., n. 6 (emphasis in original). Thus, the First Circuit does not apply the principle to the substantive facts of the case, but merely references it in a footnote as dicta. It does not evaluate the principle or assess either position. Moreover, the First Circuit acknowledges the contrary holding

in *Roth* – not a resounding endorsement of the "First-to-File" rule.[2]

Furthermore, the facts of the case are distinguishable from those in *Hyde Park*. Most importantly, here – unlike *Hyde Park* – the state court had jurisdiction over its proceeding as no removal notice was, or could have been, filed. Also, in *Hyde Park*, the court emphasized the "flurry of litigation" which precipitated both the state court temporary restraining order and the federal court injunction to be issued on the same day. Similar to *Barancik*, there was a clear race to the courthouse between the parties. In this case, however, the City was not racing to the state courthouse before the federal court could decide the issues. Indeed, there was no motion pending which the federal court could decide. Moreover, the City had no choice but to file its action in state court, since only a state court has jurisdiction over a condemnation action. The factual circumstances presented by the petition are readily distinguishable from *Hyde Park*, and *Hyde Park* does not prevent applying the Act in these circumstances.

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[2] The Petitioner also cites *Phillip Morris Inc. v. Harshbarger*, 946 F.Supp. 1067 (D. Mass. 1996). In that case, the U. S. District, noting that the action was brought, in part, under 42 U.S.C. § 1983, which authorized injunctive relief against state court proceedings, merely followed the First Circuit's dicta in *Hyde Park* to find a first-filed federal action is not barred by the Anti-Injunction Act. The Court acknowledged that three of the Circuit Courts of Appeal hold the Act does apply and then went on to abstain from any further proceedings in the federal case until the state court case was concluded. *Id.* at 1074 (citing *Royal Insurance Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993); *Standard Microsystems Corp. v. Texas Instruments*, 916 F.2d 58, 61-92 (2d Cir. 1990); and *Roth v. Bank of Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979)).

C. Eighth Circuit – *Prudential Insurance*

In addition to the so-called "first-to-file" issue, Martingale tries to distinguish between the outcome of its claim for injunctive relief and its claim for declaratory relief – the argument the Sixth Circuit found "clever but unpersuasive." App. at 10. It claims that the Eighth and Fifth Circuits employ a "comity" rule in which district courts have discretion to hear a declaratory judgment action that predates a state court action. Petition at 11. Yet even under this "comity" rule, there is no reason to believe the Eighth or Fifth Circuits would permit Martingale's declaratory judgment action to proceed.

In fact, the cases applying the so-called "comity" rule support a ruling in favor of the City in this case. For example, in *Prudential Insurance Company of America v. Doe*, 140 F.3d 785 (8th Cir. 1998), the Eighth Circuit found that the Anti-Injunction Act will not bar a federal court from proceeding with a declaratory judgment action "where the federal suit is filed substantially prior to any state suits, significant proceedings have taken place in the federal suit, and the federal suit has neither the purpose nor the effect of overturning a previous state court ruling." *Id.* at 788 (citing *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 886 (5th Cir. 1993)).

In *Prudential*, the federal court action was initially filed in June 1994, and the state court action was not filed until March 1995. Thus, approximately nine months elapsed before the federal court defendant filed the state court action. (It is unclear from the reported facts whether any "significant proceedings" had taken place in the first-filed federal court action.) The Eighth Circuit concluded

that it was not prohibited by the Anti-Injunction Act from hearing the federal suit.

Unlike *Prudential*, the state court action in this case was filed only three months after the federal court case and before any proceedings, other than the filing of the complaint and the answer, had taken place in the federal lawsuit. Therefore, under the "comity" analysis of the Eighth Circuit, the federal court is prohibited by the Anti-Injunction Act from hearing this case.[3]

D. Third Circuit – *Thiokol*

The Petitioner identifies the Third Circuit's position as "First-to-File, if Federal Question." Petition at 9. The Anti-Injunction Act clearly precludes Petitioner's federal court action under this approach, as well. In *Thiokol Chemical Corp. v. Burlington Indus. Inc.*, 448 F.2d 1328, 1330 (3d Cir. 1971), the plaintiff used a product for which a manufacturer claimed it held patents. The plaintiff first sued the manufacturer in federal court, seeking a declaratory judgment concerning the patents and amounts owed, but the suit was dismissed based on lack of federal jurisdiction. *Id.* The manufacturer then sued the plaintiff in state court, seeking royalties on account of past use of the questioned patents. *Id.* at 1331. The plaintiff then filed a second suit in federal court seeking a declaratory judgment that the patents were invalid. *Id.* The manufacturer

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[3] The Fifth Circuit also applies the "comity" analysis, most recently in *Royal Insurance Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 884 (5th Cir. 1993) (cited in *Prudential*, 140 F.3d at 788). That case is distinguishable for the same reasons.

moved to dismiss the second federal court action, and the court denied that motion. *Id.*

On a consolidated appeal from the decisions in the first and second federal court actions, the Third Circuit – like the Sixth Circuit – held that the Anti-Injunction Act precluded a federal injunction restraining the state court proceeding. The Third Circuit found the principal legal issues in the state court action were the validity and the infringement of the patents. *Id.* "Preferring a federal adjudication of these questions, the plaintiff seeks through the present action to forestall an otherwise competent and authoritative state ruling." *Id.* The court held the Anti-Injunction Act precluded the issuance of a federal injunction restraining the state court action. *Id.* Thus, *Thiokol* did not even concern a first-filed federal action since the initial federal action was dismissed and the state court action was filed before the second federal action.

Where *Thiokol* does differ slightly from the Sixth Circuit opinion at issue is with regard to the declaratory judgment portion of the action. On the question of whether the plaintiff could continue to pursue its declaratory judgment action, the Third Circuit noted that "[n]ormally, the policy that precludes federal injunctions against state actions is also applied to prohibit declaratory judgments which, though not enjoining the state proceeding, would decide and preempt the matter pending there." *Id.* While recognizing that the Anti-Injunction Act's "analogical extension to prohibit declaratory judgments is justified in situations where the underlying policy against unseemly interference with proper state litigation applies to both," the Third Circuit went on to hold:

> [I]f the state suit is likely to turn on a question of federal law with which a federal court is likely to be more familiar and experienced than the state court, and if the state court does not proceed in normal course to adjudicate the matter or otherwise manifests willingness to hold its hand pending federal decision on that question, we think it is neither necessary nor desirable to construe section 2283 as precluding the federal court from issuing a declaratory judgment on the common federal question.

Id. at 1332. Under this reasoning, the court held the declaratory judgment portion of the federal district court case could proceed, since the validity and infringement of the federal patents were at issue. *Id.*

Applying the Third Circuit's reasoning to the facts at hand, the Anti-Injunction Act precludes the federal action here. First, the "underlying policy against unseemly interference with proper state litigation" clearly applies to state court condemnation proceedings. In addition, the issues before the federal court do not "turn on a question of federal law with which a federal court is likely to be more familiar." *Id.* At issue in *Thiokol* was the validity of patent rights, clearly a federal issue. At the heart of this action is whether the City has the right to condemn the Bridge. Condemnation is a matter peculiarly in the purview of a state court, so the state court is more likely to be familiar and experienced with the issue than the federal court. Further, unlike the plaintiff in *Thiokol*, the City is not merely seeking to forestall adjudication in federal court. It had no choice but to file the condemnation action in state court.

Moreover, the Third Circuit also held that the second federal suit "should not proceed unless and until it shall appear to and be found by the district court that the state court is willing to hold the matter before it in abeyance pending a declaratory federal adjudication." *Id.* When the City filed its state court condemnation action, the state court manifested no such willingness to defer to the federal court on the issues. Indeed, the court heard the condemnation proceeding and, in due course, ordered the condemnation of the Bridge. Simply put, under the Third Circuit's reasoning, the federal court action is still barred by the Anti-Injunction Act.

III. The So-Called First-to-File Rule Is a Distinction Without a Difference.

Even if the Court should determine that a conflict exists among the Circuit Courts that cannot be distinguished on this case's facts and decides to take up this issue, the Court should adopt the rule applied by the Second, Fourth, and Sixth Circuits. The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Act serves as a "'necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts' and 'represents Congress' considered judgment as to how to balance the tensions inherent in such a system.'" *Denny's,*

Inc. v. Cake, 364 F.3d 521, 528 (4th Cir. 2004) (citing *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988)).

The Supreme Court has "repeatedly ruled that the ban is absolute and the language is to be taken literally." *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978) (citing *Atlantic Coast Line R.R. Co. v. Locomotive Engineers*, 398 U.S. 281, 286-87 (1970)); *see also Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977) (plurality opinion). Any doubts as to the propriety of the federal court staying a state court action should be resolved in favor of allowing the state court action to proceed. *Vendo*, 433 U.S. at 630.

In addition to three exceptions adopted by Congress, an additional "judicial exception" was created by the Seventh Circuit in *Barancik, supra*, 489 F.2d 933. *Denny's*, 364 F.3d at 529. In interpreting a statute, a court must first turn to the plain language of the statute to determine its meaning. *See Williams v. Taylor*, 529 U.S. 420, 431 (2000). "The plain language of the Act clearly and unequivocally prohibits a federal court from granting 'an injunction to stay proceedings in a State court.'" *Denny's*, 364 F.3d at 529 (citing 28 U.S.C. § 2283).

The Sixth Circuit in *Roth* acknowledged the concern expressed by now-Justice Stevens in *Barancik* that the Seventh Circuit's approach had "the salutary advantage of discouraging the unseemly race to the courthouse." *Roth*, 583 F.2d at 532 (citing *Barancik*, 489 F.2d at 935). This concern is not abated by avoiding the application of the Act. "As long as the commencement of state proceedings in any way affects or triggers the operation of the anti-injunction

statute, a race is assured, unseemly or not. . . . *Barancik* does not eliminate the race; it merely moves the finish line." *Id.* at 532-33.

Likewise, the Second Circuit also rejected *Barancik*'s concern that a court's power to rule could be defeated by the quicker action of a litigant. That court found it "axiomatic" that a state court action should not be enjoined "merely because an adverse litigant has **applied** for an order to bar such action." *Standard Microsystems Corp. v. Texas Instruments, Inc.*, 916 F.2d 58, 62 (2d Cir. 1990) (emphasis in original). Further, it held:

> A party that has not been enjoined is ordinarily free to act, notwithstanding the pendency of applications to enjoin the action. In many circumstances litigants may lawfully moot an application by acting before the court has ruled. To enjoin conduct requires a judge's order, not merely an application for a judge's order. Where speed is needed, the rules of procedure provide for temporary restraining orders, even without notice, to prevent irreparable harm.

Id.

Furthermore, the Second Circuit warned that, under *Barancik*, "merely by filing an application for relief, a party nullifies an Act of Congress." *Id.* The Anti-Injunction Act seeks to avoid the "friction" between federal and state courts. The *Barancik* approach puts "the power in the hands of the plaintiff unilaterally to nullify the effectiveness of an Act of Congress and to create exactly the kind of federal-state conflict that Congress sought to prevent." *Id.* (citing *Hicks v. Miranda*, 422 U.S. 332, 348-50 (1975)).

Clearly, on this reasoning, the rule applied by the Second, Fourth, and Sixth Circuits is the better approach.

IV. Reviewing The Circuit Court's Application of the Anti-Injunction Act Will Not Change the Outcome Because of the District Court's Decision on the Merits.

As outlined in Section I, even if this Court issues a writ, determines that the Anti-Injunction Act does not bar Martingale's action, and remands the case to the Sixth Circuit, the outcome is not likely to change because the District Court made the correct decision on the merits.

A. The Petitioner Does Not Have a Franchise, and the City Is Not Condemning a Franchise.

The Petitioner claimed it has a "subsisting and perpetual federal and state granted right to operate the Bridge" based on franchises allegedly granted by the federal government and the Commonwealth of Kentucky. The Petitioner's assertions failed because it does not own a franchise, and the City need not condemn a franchise to condemn the Bridge itself.

A franchise is "a right or privilege granted by a sovereign power to a party to do some act which such party could not do without a grant from the government." *Eastern Kentucky Resources v. Arnett*, 934 S.W.2d 270, 275 (Ky. 1996). A franchise is an intangible property right, a right to do something that the general public cannot. *See Covington Drawbridge Co. v. Shepherd*, 62 U.S. 112, 123 (1858). A franchise is not a physical structure. In this case,

the franchise was the right to collect tolls, a separate legal interest from the bridge itself. *Id.* at 124.

There is evidence of one franchise being granted to the original owner of the Bridge. In 1888, the Kentucky General Assembly passed a law incorporating the Louisville and Jeffersonville Bridge Company. 1888 Ky. Acts, ch. 212, § 1. The General Assembly also granted the company the "right and power to construct, maintain and operate a bridge" between Louisville and Jeffersonville, Indiana, and the right "to charge, demand and receive tolls for the use thereof." *Id.* at § 2. The General Assembly expressly granted the Louisville and Jeffersonville Bridge Company the authority to "enjoy all corporate powers, privileges and franchises necessary or proper to enable [it] to carry out and execute the purposes hereinafter designated." *Id.* at § 1.

Contrary to the Petitioner's claims before the District Court, regardless of previous owners' franchise rights, Martingale did not acquire a franchise. When Bridge the Gap purchased the Bridge at the sheriff's sale for $10,300, it did not purchase the right to collect tolls on the Bridge. It purchased nothing more than the "superstructure, beams, bolts, support pilings, piers, abutments and other improvements that are part of the Bridge itself," that the City seeks to acquire by eminent domain.

The Petitioner cannot claim now it has a franchise – the franchise, if any, was abandoned long ago. The ICC's formal abandonment order on May 1, 1969, the razing of the Bridge's approaches thirty years ago, and the fact that the Bridge has not been used for transportation of any vehicles, persons, or livestock in thirty years extinguished

this right. The franchise ceased long ago to serve the public and has been abandoned.

The trial court correctly found that the franchise was abandoned in 1969 when the ICC formally abandoned the bridge. Further, it found that the franchise, having not been exercised in thirty years, had ceased to serve the public. Relying on *Jack v. Williams*, 113 F. 823 (D.S.C. 1902), the trial court correctly concluded that a franchise that has ceased to serve the public is deemed to be abandoned.

The U. S. Supreme Court agrees that non-use of a franchise causes the franchise to be forfeited. In *Railroad Commission of Texas v. Eastern Texas Railroad Company*, 264 U.S. 79 (1924), the Court found a railroad company had forfeited its franchise when the company had "ceased to exercise the privilege conferred by its charter, of maintaining and operating the road as a common carrier, – and this is because the available traffic has diminished to a point where further operation is economically not possible." *Id.* at 87. *See also Given v. Wright*, 117 U.S. 648, 656 (1886) (A "franchise may be lost in the same way, nonuser being one of the common grounds assigned as a cause of forfeiture").

B. The City Has the Right to Condemn the Bridge as Personal Property.

The Petitioner also alleged that the City does not have the authority to condemn the Bridge because the City is only permitted to condemn "real property and personal property located on such real property." This argument also is misleading.

KRS § 97.257 relates to the power of cities of the first class to acquire by condemnation property needed for any park, playground, or community center. The statute states in full:

> Whenever property shall be needed by any city of the first class for any park, playground, or community center purpose contemplated in KRS 97.250 to 97.257, either within or beyond the boundaries of such city, in the county in which such city is located, the director of parks and recreation may, with the consent of the legislative body of such city, order the condemnation of such property in the manner provided in the Eminent Domain Act of Kentucky.

Significantly, the statute does not limit the City's powers of eminent domain to "real" property. Rather, the statute simply permits the condemnation of "property." KRS § 416.540, the definitions provision of the Eminent Domain Act, defines "property" as "real or personal property, or both, of any nature or kind that is subject to condemnation." The absence of any limitation on the type of property that a city of the first class can condemn for a public park, therefore, is significant and controlling.

The Petitioner's reliance in the District Court on KRS § 97.251, the definition of "park property," is immaterial for condemnation purposes. The Petitioner contended that the City only has the power to condemn "park property" and that the definition of "park property" does not include "personal property," "franchises," or "bridges." KRS § 97.257 grants the City the right to condemn "property," however, not "park property." The definition of "property" includes "real or personal property, or both, of any nature or kind that is subject to condemnation." KRS § 416.540. Even if

KRS § 97.251 had any application, the definition of "park property" clearly includes personal property since items of personal property, such as "seats," "benches," and "fountains," are specifically included in the statute.

KRS § 97.257 also directs that condemnation is to proceed under the Eminent Domain Act of Kentucky. The Eminent Domain Act of Kentucky provides:

> Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is authorized by law, to exercise its right of eminent domain, the condemnor may condemn such property, property rights, privileges or easements pursuant to the provisions of KRS 416.550 to 416.670. It is not a prerequisite to an action to attempt to agree with an owner who is unknown or who, after reasonable effort, cannot be found within the state or with an owner who is under a disability.

KRS § 416.550 (2004).

The City has the unquestionable authority to condemn the Bridge as personal property under the Eminent Domain Act. The Act's general grant of power includes the right to "acquire the property right, privileges or easements. . . ." Such a broad grant of authority sanctions the City's acquisition of the Bridge.

C. The Bridge Is Not Operated in Interstate Commerce, and No Federal Law Prohibits the City from Condemning It.

Finally, the Petitioner argued that the City is prohibited from condemning the Bridge because the Bridge

operates in interstate commerce. As the trial court recognized, however, "the contention that the Bridge is in interstate commerce is ludicrous. The structure is usable only by pigeons and other winged creatures." App. at 19.

1. The Rivers and Harbors Act does not affect the City's right to condemn the Bridge or the City's authority over the Bridge.

The Petitioner alleged that "[t]he City and Waterfront do not have authority to condemn the Bridge because under federal law, specifically 33 U.S.C. § 401, et seq., neither a state nor a local government has authority as to a bridge over navigable waters which forms part of interstate commerce."

The Petitioner's first error was its contention that the Bridge "forms a part of interstate commerce." A bridge that has no approaches and no points of access can hardly be claimed to be "a part of interstate commerce." The owners who last operated the Bridge as a railroad line petitioned in 1968 to abandon the Bridge. When the Interstate Commerce Commission formally approved the abandonment on May 1, 1969, it concluded that "the continued maintenance and operation of the [Bridge] would impose an undue and unnecessary burden on applicant and upon interstate commerce."

Moreover, the Petitioner contended that "[t]he Big Four Bridge . . . having been constructed under the authority of the U. S. Congress under a specific Act [River and Harbors Appropriation Act] nonetheless remains a part of interstate commerce by virtue of the provisions of 33 U.S.C. § 401 et seq." The Rivers and Harbors Act, however, regulates construction of bridges over the river by those who otherwise

have authority to construct – it does not grant a franchise or authority to construct. Perhaps due to the fact that the Act does not prohibit condemnation of the Bridge, the Petitioner failed to identify the specific portion of the Rivers and Harbors Act (which comprises "33 U.S.C. § 401 et seq.") that it contended entitled it to the relief sought. As the trial court pointed out, "[n]o specific section of the Act is cited, and possibly for good reason. Our own review indicates that the Act does not prohibit condemnation." App. 20.

2. The condemnation of the Bridge will not impermissibly burden interstate commerce.

The Petitioner also contended that if federal law does not automatically render all bridges to be "in interstate commerce," then Bridge the Gap's specific use of the Bridge renders it "in interstate commerce." Since Bridge the Gap purchased the Bridge in 1987, the alleged commercial activity related to the Bridge itself consists of the lighting of the Bridge during holiday seasons. Holiday lighting is certainly not one of the uses envisioned when the bridge franchise was created, and Petitioner stretched credulity by contending in the District Court that an ability to see lights from two states creates interstate commerce.

3. The ICC's Order of Abandonment terminated federal jurisdiction over the operation of the Bridge and cleared the way for the Bridge's condemnation under state law.

The Petitioner conceded that the Bridge has been abandoned as a rail line. It maintained, however, that the

abandonment of the rail line is not an abandonment of the Bridge itself.

This theoretical scenario is unavailing. Practically speaking, neither Bridge the Gap nor Martingale nor any purchaser of the Bridge has the ability to use the Bridge for a railroad because there are no means of access to the Bridge superstructure. The Kentucky and Indiana approaches to the Bridge were demolished over 25 years ago, and the approaches cannot be replaced because ownership of the real estate under the Bridge was severed by a previous owner. Bridge the Gap and Martingale do not even have an easement to access the Bridge from the land on either side of the Ohio River. Any implied easement would only relate to access without ramps, the status when the real estate was severed. Therefore, the suggestion that a rail line could ever be constructed again on the Bridge is simply impossible.

4. The Bridge is not a post route, and condemnation will not unconstitutionally interfere with the delivery of mail.

The Petitioner also argued that the City does not have authority to condemn the Bridge because past designation of the Bridge as a post route places it in interstate commerce. The trial court properly rejected this argument, holding that "[d]esignation of the Bridge as a post route in the late 1800s does not preclude its abandonment and condemnation in 2002 after many years of disuse. We find nothing in the Constitution which requires the perpetuation of an inaccessible, abandoned bridge structure in order to preserve a long-unused post route designation." App. at 21.

CONCLUSION

Although the Petitioner makes every effort to exploit a supposed split among the Circuit Courts of Appeal on the application of the Anti-Injunction Act, the differences among the circuits have no impact here because the reasoning behind the decisions declining to apply the Act are distinguishable based on the unique facts of this case. This case is simply the wrong case for the Supreme Court to consider for rulemaking on the Anti-Injunction Act. There is no reason to believe that if this case had been decided in any circuit other than the Sixth that a different result would have been reached. And, even if the Court were to decline to apply the Anti-Injunction Act, the City would still prevail on the merits of this case.

For the foregoing reasons, the Respondents request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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